Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Appeal from Order No. 170 of 2002

United India Insurance Co. Ltd.
Through its Divisional Manager
Divisional Office, Tikonia, Nainital Road,
Haldwani, District Nainital. … **Appellant.**

Versus

1. Sarafat Khan, S/O Sri Jumma Khan,
   R/O Nai-Mandi, Guajajali
   Haldwani, District Nainital.
2. Smt. Gopi Devi W/O Khem Chandra,
   R/O Gaujajali, Bareilly Road, Nai Mandi,
   Haldwani, District Nainital.

… **Respondents.**

Sri B.C.Pande, Advocate, learned counsel for the appellant.
Sri Syed Nadeem, Advocate, learned counsel for the respondent no.1.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Date December 06, 2004.

(Per Hon'ble B.S. Verma, J.)

This appeal has been preferred under Section 173 of the Motor Vehicles Act, 1988, ***(in short The Act)*** against the judgment and Award dated 23-4-2002 passed in M.A.C. Case No. 56 of 1999, Sarafat Khan & another Vs. Smt. Gopi Devi & another by Motor Accident Claims Tribunal/Addl. District Judge Haldwani, Nainital, (***in short the Tribunal),*** whereby the learned Tribunal allowed the claim petition awarding Rs.2,40,000/- as compensation along with interest @ 9% per annum, against the appellant under Section 166 of the Act. Aggrieved, the Insurance Company-appellant has come up in appeal mainly on the ground that there was no negligence or rashness on the part of the driver of the bus, therefore, there was no liability for compensation on the appellant towards the injured-driver

and that the petition was no maintainable under the Act. The appellant also assailed the finding on the quantum of compensation.

Safarat Khan, driver of the bus No. UP 2-C-5038, sustained grievous injuries in the course of his employment in a vehicular accident at about 3 a.m. on 26.2.1999 between Rudrapur and Haldwani. The injured was removed to Base Hospital, Haldwani and lateron he was shifted to Bareilly Hospital. He was operated upon. The injured suffered disability due to accidental injuries, hence claim petition was filed claming Rs. 7,00,000/- as compensation.

The owner of the vehicle contested the petition asserting that the vehicle was duly insured with the appellant, therefore, the insurer is liable to pay compensation, if any.

The appellant-Insurance Company has contended that the accident was caused due to own negligence and rashness on the part of the injured-driver, therefore, it was not liable for compensation.

On the said pleadings, learned Tribunal framed three issues in the case. On Issue No.1 and 2, it held that there was no negligence on the part of the injured-driver and the accident was inevitable and that the owner and insurer are liable to pay compensation. On Issue No.3, the learned Tribunal held that the claimant was entitled to get sums of Rs. 1,35,000/-towards medical expenses, Rs. 15,000/- towards special diet, Rs. 50,000/- towards mental and physical pain and sufferings, Rs. 25,000/- towards future expenses and loss of expectancy of life and Rs. 15,000/- towards loss of amenities. Thus, total compensation of Rs 2,40,000/- along with interest @ 9% per annum was awarded by the Tribunal, by observing that the claimant had option to file the petition under the provisions of the Motor Vehicles Act.

In support of appeal, the learned counsel for the appellant has submitted that there was no negligence of the driver-injured, therefore, no vicarious liability can be fastened on the owner and consequently, the insurer is not liable to pay compensation. On the other hand, the learned counsel for the claimant-respondent submitted that the finding of the tribunal was fully supported by the evidence of witnesses and the amount of compensation was just and proper.

The question before us for consideration is as to what is a negligent act. Such a matter was considered by the Hon'ble Supreme Court in the case of "***Municipal corporation of Greater Bombay Vs. Shri Laxman lyer and another" [2004(1) T.A.C. 3 (S.C.)].*** It has been held by the Apex Court that ***"Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations who ordinarily by reason of conduct of human affairs would do or obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively careless conduct."*** In the instant case, the record reveals that claimant has adduced P.W.2, Tikam Dass, who in his testimony has clearly corroborated the statement of the claimant that at the time of accident, i.e. at about 3 a.m. wild animals came over the road and in order to save them, the bus dashed against a tree. The deposition of the claimant and his witness clearly lead to the only inference that the driver-injured was fully vigilant at the time of accident. All of a sudden wild animals appeared on the road and in the process to save them, the vehicle dashed against a tree. It is not in dispute that the

road passes through forest between Rudrapur and Haldwani and that the accident occurred at about 3 a.m. In the circumstances, it cannot be held that the injured-driver was not cautious or in any manner rash in driving the vehicle when the accident occurred. The appellant has failed to suggest any of circumstances on record favourable to its stand. Therefore, the contention of the appellant is not tenable on this score.

It was next contended on behalf of the appellant that the petition under the Motor Vehicles Act was not maintainable, because the injured-driver sustained injuries in the course of his employment, therefore, the petition ought to have been filed under the Workmen's Compensation Act. This argument is not tenable. The provisions of Section 167 of the Act are clear on the point. Under Section 167 it is open to the claimant either to invoke the provisions of Motor Vehicles Act or the Workmen's Compensation Act. The only bar is that compensation cannot be claimed under both these Acts.

The learned counsel for the appellant has lastly hammered the quantum of compensation awarded by the Tribunal. The scope for filing an appeal by the Insurance Company is limited. Unless there is specific permission granted under Section 170 of the Motor Vehicles Act, or there is a finding of the Tribunal that there was collusion between the claimant and the person against whom the claim has been made, it is not open to the appellant to challenge the quantum of compensation in appeal. We are fortified in our view by the Apex Court judgment in the Case of "***National Insurance Company Ltd. Chandigarh Vs. Nicolletta Rohtagi and others" [(2002) 7, Supreme Court Cases, 456].*** In that case, it has been observed that ***"even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regard negligence or contributory negligence of the offending vehicle".***

No other point was urged or argued before us in appeal.

Having considered the case from all the four corners, the appeal lacks merit and must fail.

The appeal is dismissed. The judgment and award, under appeal, is upheld. No order as to costs.

The amount is deposit with this Court be remitted to the Motor Accident Claims Tribunal concerned, for being paid to the claimant.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

RCP

(B.S. Verma, J.) **(Irshad Hussain, J.)**

Date December 13, 2004.

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ARANCHAL AT NAINITAL.